No. 96-899

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL FOR THE CITY OF PHILADELPHIA,

Petitioners,

vs.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The instant petition for a writ of certiorari seeks review of a decision of the United States Court of Appeals for the Third Circuit ("the court of appeals"). The court of appeals opinion is reported at 91 F.3d 586 (3d Cir. 1996).[1] Respondents request that the Court deny the petition for the reasons described below.

STATEMENT OF THE CASE

Respondents oppose the petition for writ of certiorari, which misrepresents the ruling of the court below and the relevance of this Court's opinion in *United States v. Salerno*, 481 U.S. 739 (1987). Contrary to the representations of petitioners, if *certiorari* were granted this Court undoubtedly would affirm the July 31, 1996, decision of the court below as a faithful (albeit somewhat relaxed) application of the principles of strict scrutiny review of local race-based set-aside programs announced by this Court in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (hereinafter referred to as *Croson*).[2]

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1. Citations to July 31, 1996 Opinion and Judgment of the United States Court of Appeals for the Third Circuit and January 11, 1995 Memorandum Order, Finding of Facts and Conclusions of Law of the United States District Court for the Eastern District of Pennsylvania will be to the opinions attached as Appendix B and C respectively to the Petition for a Writ of Certiorari.

2. If anything, certain of the court of appeals' rulings failed to adhere strictly enough to the dictates of *Croson*. Specifically:

1. the court of appeals permitted the City to introduce post-enactment statistical evidence to establish that the City had a compelling justification for its enactment of Chapter 17-500 in 1982;

2. the court of appeals refused to summarily reject the City's simplistic statistical analysis of prime contractor awards during fiscal

(Cont'd)

A. Course of Proceedings and Disposition of the Case Below.

On April 14, 1989, nine contractor associations (respondents herein, referred to as such or as "Contractors") brought suit in the United States District Court for the Eastern District of Pennsylvania against the City of Philadelphia and two city officials (petitioners herein, referred to as such or as "the City"), challenging the constitutionality of Chapter 17-500 of the Philadelphia Code ("Chapter 17-500" or "Ordinance"). Respondents alleged that Chapter 17-500's participation requirements for minority-, female-, and handicapped-owned businesses in City contracting violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Chapter 17-500 was enacted as an ordinance of the City of Philadelphia in 1982. Chapter 17-500 became effective on or about August 12, 1983 upon promulgation by the Minority Business Enterprise Council ("MBEC") of regulations governing

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(Cont'd)

years 1979 through 1982 as proof of a pattern or practice of discrimination by the City against black-owned prime contractors; and

3. the court of appeals refused to affirm the district court's invalidation of Chapter 17-500 on the basis of its finding that City Council's enactment of Chapter 17-500 was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry.

In each case, however, the error of the court of appeals was harmless for as described *infra*, the court found an independent and unassailable basis for affirming the district court's conclusion that Chapter 17-500 violates the Fourteenth Amendment to the United States Constitution.

the award of all City contracts which are let by any City office, department, independent board, or independent commission for vending, including materials, equipment, services and supplies; public works; and personal and professional services ("Covered Contracts").

As originally enacted, Chapter 17-500 specified that at least 15 percent of the total dollar amount of each Covered Contract be paid to one or more minority-owned business enterprises ("MBE's") and that at least 10 percent of the total dollar amount of each Covered Contract be paid to one or more female-owned business enterprises ("WBE's"). In 1988, Chapter 17-500 was amended to specify that at least 2 percent of the total dollar amount of each Covered Contract be paid to one or more handicapped-owned business enterprises ("HBE's").

In earlier proceedings before the district court and the court of appeals, the participation requirements for WBE's and MBE's (other than black-owned businesses) imposed on the City's public works projects were invalidated because neither the evidence presented to City Council nor the "post-enactment" evidence developed by the City in this litigation provided any basis for concluding that qualified, willing and able WBE's and MBE's (other than black-owned businesses) were victims of systemic discrimination by the City or its prime contractors on such projects. Chapter 17-500's HBE participation requirement was upheld under the rational basis test.

In May and June of 1994, the district court conducted a nine-day bench trial on the constitutionality of Chapter 17-500's participation requirements for black-owned public works contractors.[3] On January 11, 1995, the district court struck down

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3. Section II of the July 31, 1996 Opinion and Judgment of the United States Court of Appeals For the Third Circuit recounts in detail the procedural steps of this case from the initial filing of the complaint to the 1994 trial.

that provision of the Ordinance, concluding that the requirement violated both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, as described by this Court's opinion in *Croson*. According to the district court, neither the evidence presented to City Council nor the post-enactment evidence offered at trial provided a "strong basis in evidence" that discrimination against black contractors was practiced by the City of Philadelphia or its prime contractors. The court also concluded that the record was devoid of proof that Chapter 17-500's fifteen percent goal for minority participation in City construction contracting is "narrowly tailored" to remedy identified prior discrimination in the Philadelphia construction industry. (Op. 122a, Appendix C).

Importantly, the district court specifically found that City Council was improperly motivated by racial politics when it enacted the Ordinance:

> The legislative history of Chapter 17-500 is replete with references which prove that **City Council's enactment of Chapter 17-500 was motivated by racial and gender politics**, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry.

(Op. 115a, n. 24, Appendix C) (emphasis supplied).

On July 31, 1996, a panel of the court of appeals unanimously affirmed the district court's decision. Consistent with its earlier rulings, the court of appeals applied *Croson's* strict scrutiny review and concluded that Chapter 17-500's participation requirements for black-owned public works contractors violated the Equal Protection Clause. In describing the burden of proof that strict scrutiny review imposes upon a

party challenging a state or local government's race-based preference, the court noted that the party could succeed by showing **either** (1) that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) that there is not a "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. (Op. 21a, Appendix B).

Ironically, the court of appeals neither agreed nor disagreed with the district court's finding that the Ordinance was motivated by racial politics, commenting simply, "We do not reach this issue." (Op. 25a, n. 14, Appendix B). Having refused to disturb that finding, the court of appeals turned to the evidence offered by the City to demonstrate that City Council had a strong basis in evidence for concluding that race-based discrimination in public works contracting existed and that the remedy chosen was necessary. As noted by the court of appeals, the City advanced three distinct forms of racial discrimination to sustain the Ordinance's constitutionality: (i) statistical evidence of discrimination by prime contractors to the City in the award of subcontracts; (ii) racial discrimination by the respondent contractor associations in admitting members; and (iii) racial discrimination by the City in the award of its prime contracts. (Op. 26a, Appendix B).

The court of appeals agreed with the district court's finding that the City failed to offer any credible evidence of discrimination by the prime contractors to the City in the award of subcontracts, noting among other flaws that the City's own expert admitted that he "made no presentation to the Court as to participation by black minorities or blacks in subcontracting." (Op. 28a, Appendix B).

The court of appeals also agreed with the district court that

the City's unsubstantiated "evidence" of low MBE membership in the respondent contractor associations was not sufficient to justify the Ordinance's remedial purpose. Like the district court, the court of appeals found no evidence in the trial record to indicate that a single black-owned contractor was denied membership in any of the associations. (Op. 33a, Appendix B). The appellate court went on to note that the City awarded its prime contracts by sealed, competitive bidding without regard to membership in the respondent associations and that nothing in the record suggested that the City favored members of the associations in that bidding process. (Op. 34a, Appendix B).

Unlike the district court, however, the court of appeals refused to determine whether the City's statistical analysis of black-owned contractor participation as prime contractors on Philadelphia public works projects during fiscal years 1979 through 1982 was sufficient to justify City Council's avowed conclusion that qualified, willing and able black-owned contractors were being discriminatorily denied such contracts by the City itself. In light of the many serious flaws in the City's evidence, the court's comment that it is "a close call" whether that evidence demonstrates that the City engaged in racial discrimination against qualified, willing, and able black-owned contractors, (Op. 42a, Appendix B), is surprising to say the least. Nonetheless, for the purpose of the instant petition, it is sufficient to note that the court of appeals did not reach that issue because in its view, Chapter 17-500 clearly would not be narrowly tailored to eradicate and remedy any such prime contractor discrimination due to its almost exclusive focus on the subcontracting market and because the fifteen percent goal set forth in the Ordinance was far too excessive to address any possible race-based discrimination identified in Philadelphia prime contracting. (Op. 42a, Appendix B).

A subsequent petition filed by the City requesting rehearing by the Court of Appeals for the Third Circuit *en banc* was denied.

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15, respondents point out the following misstatements of fact and law contained in the petition.

Petitioners assert that the district court and the court of appeals failed to adhere to Chief Justice Rehnquist's comment in *United States v. Salerno*, 481 U.S. 739 (1987), that a facial challenge to a legislative act will not be sustained unless the challenger establishes "that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745 (the so-called "*Salerno* rule"). Petitioners assert that had the court of appeals followed the *Salerno* rule, it would have found "many circumstances where the Ordinance was constitutional." (Petition, p. 10). For this assertion, petitioners rely on the exemption and waiver provisions of the Ordinance. Petitioners' argument is confusing in that they seemingly contend that a local government can employ racial preferences without any evidentiary basis for concluding that remedial action is necessary so long as its program includes such "escape" mechanisms for use whenever the preference will be applied for the benefit of a contractor who was not a victim of discrimination.

Whether or not the *Salerno* rule accurately states the law with respect to facial challenges to race-based classifications under the Equal Protection Clause, that issue would be irrelevant to this Court's review of the July 31, 1996 decision of the court of appeals. Even if this Court were to disregard all of Chapter 17-500's constitutional flaws noted by the district court, the court of appeals' conclusion that the Ordinance is not a narrowly tailored remedy for the City's own discrimination against black-owned prime contractors because of the Ordinance's use of subcontractor participation requirements is unassailable. *A*

fortiori, under *Croson*, no set of circumstances exists in which Chapter 17-500 would be valid.

The City's claim that its tactics and proofs would have been different if it understood that the *Salerno* rule was no longer good law and would not be applicable to this case is a gross misstatement of fact. This case was tried by the district court and reviewed by the court of appeals according to the dictates of *Croson*. Respondents offered compelling proof that neither the evidence presented to City Council nor the post-enactment evidence offered by the City at trial provided a compelling justification for enactment of race-based remedial legislation. Similarly, respondents clearly and convincingly demonstrated that Chapter 17-500's fifteen percent goal for black-owned participation in City construction contracting is not narrowly tailored to remedy any identified discrimination in the Philadelphia construction industry. And finally, respondents proved and the district court specifically found that **"City Council's enactment of Chapter 17-500 was motivated by racial and gender politics."**

The City was well aware that under *Croson*, it would have to meet respondents' proofs in order to sustain the constitutionality of the Ordinance, whether or not the so-called "*Salerno* rule" applied. It is obvious from the opinions of the district court and the court of appeals that after six years of litigation, the City could not and did not meet those proofs.

Petitioners also assert that the district court held that the statistical study prepared by Dr. Brimmer was inadmissible as a matter of law, and that the court of appeals adopted the district court's holding thereby disregarding the holding of a prior decision of the court of appeals which was "the law of the case." (Petition, p. 17). This contention as well is a gross mischaracterization of the proceedings below.

Dr. Brimmer testified at the nine day trial before the district court in May and June of 1994 and his disparity study was admitted into evidence. (Op. 70a-75a, Appendix C). The district court rejected the conclusions of the Brimmer study. (Op. 75a-97a, Appendix C). In considering the holding of the district court with regard to the Brimmer study, the court of appeals noted:

> **We agree with the City that Contractors II established as the law of the case the admissibility of Dr. Brimmer's analysis.** Neither this nor our observations regarding the burden of persuasion, however, required the district court to accept that analysis and Dr. Brimmer's opinions uncritically. Like any other trier of fact called upon to evaluate expert testimony, it was entitled to accept of reject the facts and assumptions upon which the expert testimony was based and to evaluate the methodology that underlay it.

(Op. 24a, Appendix B) (emphasis supplied).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY EMPLOYED THE ANALYSIS SET FORTH BY *CROSON* TO INVALIDATE THE CITY OF PHILADELPHIA'S MINORITY SET-ASIDE ORDINANCE.

This case does not present the Court with an opportunity to review the validity of the *Salerno* rule. Instead, a grant of *certiorari* would present this Court with nothing more than an opportunity to affirm the lower courts' correct application of strict scrutiny review under *Croson*.

Justice O'Connor's description in *Croson* of the importance and purpose of strict scrutiny review is instructive:

> Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 204. Justice O'Connor's comment makes clear that a local government's race-based preference program is facially invalid if it permits the granting of preferences to black-owned contractors who were not victims of systemic discrimination by that local government or its prime contractors. This is true even though the program may in some cases actually benefit true victims of racial discrimination in public contracting because the lack of a tight "fit" or relationship tends to prove that the drafters of the program were less concerned with remedying identified discrimination than they were with gaining political favor.

As described earlier, the court of appeals concluded that even if discrimination in City contracting existed, Chapter 17-500 was not a narrowly tailored response to that discrimination because it focused almost exclusively on the subcontracting market and because the fifteen percent participation goal for black-owned contractors was clearly an excessive remedy for the race-based discrimination that the City allegedly practiced against black-owned prime contractors. This ruling echoed the district court's finding that the City was unable to provide a sufficient evidentiary basis from which to conclude that a fifteen

percent set-aside was necessary to remedy prior discrimination against black contractors in the market for City contracts.

Additionally, the record provided the court of appeals with other independent grounds for invalidating Chapter 17-500. The record shows that the subjective intent of the Philadelphia City Council in adopting the affirmative action program was not to remedy race discrimination by the City but rather to curry political favor. (Op. 45a-49a, Appendix B). The district court found the legislative history of Chapter 17-500 to be "replete" with references which prove that City Council's enactment of Chapter 17-500 "was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry." [4] (Op. 115a, n. 24, Appendix C). Although the district court's finding of racial politics was neither accepted nor rejected by the court of appeals, the court of appeals did specifically rely on portions of Chapter 17-500's legislative record in holding that it could not say with assurance that Chapter 17-500 was anything more than "the product of unthinking stereotypes or a form of racial

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4. Chapter 17-500's legislative record showed that Philadelphia City Council never even attempted to determine the scope of the injury it allegedly sought to remedy with the Ordinance. (Op. 46a, Appendix B). The most telling portion of the legislative history in this regard includes a Councilperson's candid admission in the course of debate on an amendment to Chapter 17-500:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We knew that there were a lot of women out there and a lot of minorities out there and they weren't getting their share. And we set a goal. And it was pretty arbitrary. It was pretty arbitrary.

Id.

politics." (Op. 53a, Appendix B (quoting *Croson*, 488 U.S. at 510)). Respondents are confident that if this Court were to grant *certiorari*, it would agree with the district court's finding and affirm the invalidation of the Ordinance on that basis alone. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986).

Respondents are equally confident that if this Court were to grant *certiorari*, it would agree with the district court's rejection of the City's statistical analysis of black-owned prime contractor participation on Philadelphia public works projects during fiscal years 1979 through 1982 as a sufficient basis for City Council's avowed conclusion that qualified, willing and able black-owned contractors were being discriminatorily denied such contracts by the City itself. Although the district court correctly noted numerous substantial flaws in the City's evidence, this Court need look no further than the district court's finding that the City's statistics are not significant because only seven black contractors sought prequalification to bid on any of those contracts.[5] (Op. 96a, Appendix C).

In the concluding section of her opinion in *Croson*, Justice O'Connor provided the following specific guidance for legislatures and courts regarding a state or local government's use of race-based contracting set-asides as a remedy for prior discrimination against minority contractors:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had

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5. As noted by the district court, an interested contractor was required to apply for prequalification with respect to each City public works contract awarded during that time period.

> evidence *before it* that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of *qualified* minority contractors *willing* and *able* to perform a *particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could arise* . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures *against those who discriminate* on the basis of race or other illegitimate criteria. . . . *In the extreme case*, some form of narrowly tailored racial preference *might be necessary* to break down patterns of deliberate exclusion.

488 U.S. at 509 (emphasis supplied). The district court and the court of appeals correctly applied these principles[6] in declaring that Chapter 17-500 is not narrowly tailored to serve a compelling state interest.

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6. *See* footnote 2 *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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